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In The

Supreme Court of the United States

October Term, 1992

IN RE THE MARRIAGE OF

CLAUDE A. STRASS,

Petitioner,

and

BETH G. STRASS,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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OPINIONS BELOW

The Supreme Court of Illinois denied Claude Strass' petition for leave to appeal on October 7, 1992. That denial is not reported in an official published reporter.

The opinion of the Appellate Court of Illinois, which was the subject of the petition for leave to appeal to the Supreme Court of Illinois, was filed on May 22, 1992. That opinion of the Appellate Court of Illinois is not reported in an official published reporter, but bears a docket number of No. 2-91-1094 (Ill. App. Ct., 2nd Dist., May 22, 1992).

The denial of the petition for leave to appeal by the Supreme Court of Illinois and the opinion of the Appellate Court of Illinois are reprinted in the appendix to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The denial of the petition for leave to appeal by the Supreme Court of Illinois was entered on October 7, 1992. No petition for rehearing was filed. The opinion and judgment of the Appellate Court of Illinois was entered on May 22, 1992. No petition for rehearing was filed. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States of America, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a

> witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Constitution of the United States of America, Amendment XIV, Section 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Illinois Supreme Court Rules, Rule 231(f), Ill. Rev. Stat. Ch. 110A § 231(f) (1991):

> (f) Time for Motion. No motion for the continuance of a cause made after the cause has been reached for trial shall be heard, unless a sufficient excuse is shown for the delay.

Illinois Marriage and Dissolution of Marriage Act, ¶ 602(c), Ill. Rev. Stat. Ch. 40, § 602(c) (1989):

> (c) The court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child

> is in the best interest of the child. However, such presumption shall not be construed as a presumption that an order awarding joint custody is in the best interest of the child.

STATEMENT OF THE CASE

This case is an Illinois case brought by Beth Strass to dissolve her marriage to Claude Strass. The trial of the case began in January 1991 (C295-C299), and continued on intermittent dates thereafter with Judgments entered dissolving the marriage and awarding custody of the minor child on June 6, 1991 (C323-C326), a Judgment entered distributing the property on August 27, 1991, and an order establishing visitation and denying Claude Strass' Motion for Reconsideration on September 18, 1991 (C382).

Grounds were stipulated and the custody portion of the case was tried first to minimize the time spent at trial by the attorney appointed to represent the child. The custody portion of the trial concluded on April 8, 1991 and the continuation of the trial on the remaining issues was then scheduled for April 18, 1991. On April 16, 1991, the judge gave his written decision on the issue of custody in which he found the husband to be "capable of being the custodial parent" (C239-242, C240). On April 18, 1991, an order was entered pursuant to motion by Claude Strass granting his request for a continuance because of an oral surgery and the trial was rescheduled to resume May 10, 1991 (C245). On May 10, 1991, an order was entered pursuant to motion by Claude Strass granting his request for a continuance because of the death of an extended family member and the trial was rescheduled to resume May 30, 1991 (C255). On May 30, 1991, an order was entered pursuant to motion by Claude Strass granting his request for a continuance because of his being called out of state on business (C256). The trial was rescheduled to resume June 5 and 6, 1991. Before the trial was resumed, Claude Strass filed a motion requesting DNA testing of the parties and their minor child

alleging that he now questioned his paternity of the child. On June 5, 1991, after hearing argument on Claude Strass' motion questioning paternity, the court denied the motion. On the same morning of June 5, 1991, Claude Strass requested a continuance of the trial due to the fact that he had fired his attorney and the court denied his request for a continuance of the trial beyond the next morning. Through June 5, 1991, Claude Strass was represented by one attorney, John R. Heying. On June 6, 1991, Claude Strass proceeded to trial on the remaining issue *pro se* objecting to the denial of his request for time to obtain a new attorney. On June 7, 1991, the trial on the remaining issues was concluded and the trial judge, in ruling on a temporary summer visitation schedule, noted that "matters which have come to the Court's attention within the last month gives [sic] the Court some pause as to — I guess for want of a better term — the sincerity [of Claude] in wanting to maintain a relationship" with the child (C1938).

Claude Strass, once again represented by John R. Heying, the same attorney Claude fired in the middle of trial, appealed to the Illinois Appellate Court and raised, among other issues, the constitutional issue that he was denied due process of law when the trial court refused to allow him time to hire a new attorney after he terminated the services of Attorney Heying in the middle of trial. The Illinois Appellate Court declined to find that Claude Strass' constitutional rights were violated. The same issue was raised in Claude Strass' Petition for Leave to Appeal to the Supreme Court of Illinois and that petition was also denied by the Illinois Supreme Court.

SUMMARY OF ARGUMENT

The Supreme Court of the United States has not recognized an absolute constitutional right of an individual to counsel in civil cases. While some federal courts have found it appropriate to extend to an individual limited guarantees to counsel in certain types of civil cases involving questions of "liberty" or indigent

litigants and in cases involving a denial or limitation of a litigant's initial right to obtain counsel, the dissolution of marriage case at hand does not involve those types of questions. Further, this Court should not determine to expand the constitutional right of counsel to civil cases based on the particular facts of the case at hand.

REASONS FOR DENYING THE WRIT

The Supreme Court of the United States has not recognized an absolute constitutional right to counsel in a civil case. *Kentucky West Virginia Gas Company v. Pennsylvania Public Utility Commission,* 837 F.2d 600, 618 (3rd Cir. 1988).

This Court has, however, accorded to indigent litigants in certain quasi-criminal cases a constitutional right to counsel. The guarantee of fundamental due process of the Fourteenth Amendment was extended to a civil juvenile deliquency proceeding in *In re Gault,* 387 U.S. 1, 18 L. Ed. 2d 527 (1967). A constitutional right to appointed counsel has also been recognized for parents in certain civil cases involving a liberty interest such as a dependency case, *Cleaver v. Wilcox,* 499 F.2d 940 (9th Cir. 1974) and a neglect case, *People v. Brown,* 49 Mich. App. 358, 212 N.W. 2d 55 (1973).

The Supreme Court of the United States recognized in *Boddie v. Connecticut,* 401 U.S. 371 (1971) that "due process prohibit[s] a state from denying access to its courts" to indigent individuals in matrimonial litigation who are not able to pay the filing fees. The New York Court of Appeals held that an indigent litigant cannot be denied access to the courts by an inability to pay the costs of service. *Deason v. Deason,* 32 N.Y. 2d 93 (1973). However, in *In re Smiley,* 45 App. Div. 2d 785, the New York State Court of Appeals distinguished the issue of a due process right of an indigent litigant's access to courts from the issue of a constitutional right to appointed counsel in matrimonial cases and held that there was no such right.

In addition to the cases involving a litigant who is indigent or involving a litigant who faces a possible loss of a personal liberty, there are cases involving the right of due process as it relates to a litigant's right to a continuance to obtain counsel at the outset of a civil case. In one such employment discrimination case, the employee litigant's second attorney was permitted to withdraw two days before the scheduled start of trial. In that case, the trial court's refusal to grant the employee a 60 day continuance of the start of trial to obtain new counsel was held to be so arbitrary as to violate due process. *Anderson v. Sheppard,* 856 F.2d 741, 749 (6th Cir. 1988). In the present case, the discharge of the attorney took place in the middle of trial, not before the trial started, and after admonishment and warning by the trial judge that there would be no delay in resuming the trial. Even in criminal cases, it has been held that "There is no absolute right to counsel of one's choosing and a mere denial of a continuance to substitute counsel does not deprive a defendant of any constitutional right." *United States ex rel. Guillen v. DeRobertis,* 580 F. Supp. 1551, 1554 (N.D. Ill. E.D. 1984).

There are no family law cases recognizing a due process right to counsel involving a litigant who is not indigent or a litigant who does not face a potential loss of a liberty interest. The general rule seems to be that there is no constitutional right to counsel in dissolution of marriage proceedings. *State ex rel. Ondracek v. Blohm,* 363 N.W. 2d 113, 115 (1985).

The case at hand is certainly distinguishable from the matrimonial cases in which the constitutional right to counsel has been considered. The litigants are not indigent. There was no potential loss of personal liberty at stake nor was Claude denied the opportunity initially to obtain counsel. In addition, there are several reasons why it would be bad to use the case at hand to try to expand a constitutional right to counsel to other types of matrimonial cases.

First, the trial court had already been very indulgent in granting Claude Strass' three consecutive previous requests for continuances on April 18, 1991, May 10, 1991 and May 30, 1991. Then, still in the middle of trial, Claude Strass fired his attorney in the middle of the trial. The Illinois Supreme Court Rule 231(f), Ill. Rev. Stat. Ch. 110A, § 231(f) (1991) provides that no motion for a continuance shall be made after the start of trial unless a sufficient excuse is shown for the delay. The particular circumstances of Claude's firing his attorney cannot be held to be sufficient excuse. Claude Strass was warned by the trial judge before his attorney was allowed to withdraw that he would be expected to resume trial with or without an attorney. Claude then chose to terminate his representation and then chose to proceed *pro se*. The fact that Claude Strass fired his attorney, John R. Heying, in the middle of the trial and then hired that same attorney to represent him in the appeal of the trial court's decision suggests that Claude Strass was not really dissatisfied with his attorney's representation but was merely attempting to gain some advantage by delaying the proceedings.

Claude Strass represents to this Court in his Petition for Writ of Certiorari that he was given "no time" to obtain new counsel when, in fact, Claude was given approximately 24 hours. As to a particular detriment, Claude Strass represents to this Court in his Petition that the denial of his request for a continuance prevented him from having appropriate assistance of counsel at a point in the proceedings where he should have argued for logic and consistency on the issue of the amount of his visitation. However, Claude Strass was represented by counsel for the entire custody portion of the proceedings in which most all of the facts relevant to visitation frequency and schedules were presented to the court. In fact, at the conclusion of the custody portion of the trial, the trial judge indicated that he wanted the parties to agree on the visitation schedule if possible and if it was not possible, he would be in a position to rule quickly (C1588-C1589). Claude Strass was also

represented by counsel after the conclusion of the custody portion of the trial through June 5, 1991, the date that he argued the motion in which he alleged that he doubted he was the biological father of the minor child.

There was no real inconsistency or lack of logic in the trial judge's rulings on visitation. The judge first determined in his letter opinion filed on April 16, 1991 that Claude Strass was "capable of being the custodial parent" but awarded sole custody to Beth Strass. On June 5, 1991, the trial judge read Claude's Motion for DNA testing and heard argument on that motion in which Claude alleged that he was not the biological father of the minor child. The only other testimony that the trial judge heard which was relevant to visitation issues after April 16th was Claude's eliciting Beth's testimony on three alleged past visitation abuses (C1754-C1757 and C1790-C1798) and Beth Strass' testimony listing the child's school holidays (C1633-C1636). The judge then stated on June 7, 1991 that he came to believe that Claude Strass lacked sincerity in his desire to have a relationship with the child due to matters that he had heard in the last month (C1938). He could not have been referring to the testimony that he heard in the custody portion of the trial as that was concluded by April 16, 1991, well more than a month before June 7, 1991. He could only have been referring to the motion of Claude Strass alleging that he was not the biological father of the minor child (C262). The conclusion of the judge that Claude may not have been sincere in his desire to have a relationship with the child could very logically have impacted on his determination to order a "minimum" amount of visitation to Claude. Further, in view of the long distance visitation necessitated by the parties residing in the St. Louis, Missouri and Chicago, Illinois areas respectively, the ordered visitation of once a month and an annual extended period was not particularly "minimum".

Even though matrimonial cases involve all aspects of a person's personal and financial existence, a court, when

determining whether a matrimonial litigant has good or sufficient cause to be allowed a continuance in the middle of trial, must weigh the rights of all of the parties. Civil cases are unlike criminal cases where the "State" is versus an individual litigant. In the case at hand, we have two litigants whose rights had to be protected. Beth Strass had the right to expect the orderly and expeditious progress of her case to conclusion and her rights should not be inferior to Claude's right to fire his attorney and suffer the consequences.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari to the Appellate Court of Illinois.

Respectfully submitted,

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